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IN THE

Supreme Court of the United States

October Term, 1963.

No. 261.

ESTATE OF WINFRED S. HURST, DECEASED.

HARRY J. ALKER, JR.,
Petitioner.

PETITION FOR RE-HEARING OF PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND THE ORPHANS' COURT OF MONTGOMERY COUNTY, PENNSYLVANIA.

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To the Honorable the Chief Justice and Associate Justices of the United States Supreme Court:

The petition of Harry J. Alker, Jr., respectfully represents that

1. On July 8, 1963, he filed in this Honorable Supreme Court a petition for allowance of writ of certiorari to both the Supreme Court of Pennsylvania and the Orphans' Court of Montgomery County, Pennsylvania, seeking review of a "Federal Estate Tax proration judgment of $28,180.78

against said Alker's residuary interest in the Estate of Winfred S. Hurst, deceased."

2. Thereafter, a Brief for Respondents in Opposition, and also a Memorandum for the United States in Opposition were duly filed herein by the United States Solicitor General and the United States Attorney General.

3. Petitioner then filed a "Reply Brief" to both of those in opposition.

4. On October 14, 1963, this Honorable Supreme Court denied the petition for Writ of Certiorari.

5. Petitioner believes and therefore avers that, because of the welter of controversies ensuing from the accumulation of an enormously large number of cases filed with this Court during the 1963 Summer recess, your Honorable Supreme Court has inadvertently overlooked both the nationwide importance and the uniqueness of the questions of Federal Law presented by petitioner's original application for Certiorari herein.

(a) These qualities of national importance and uniqueness have always been, and still are, cited in the Rules of this Honorable Supreme Court as one of the prime reasons, and doubtless the most cogent motivation, for the granting of a review by Certiorari from this Court, viz.:

> "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

(b) Both premises suggested by this Court's own rule, above-quoted, are present in this case, viz.: the Supreme Court of Pennsylvania, per curiam without any reasoned opinion, and the lower Orphans' Court of Montgomery

County therein by a speciously contrived and untenable opinion, have decided a Federal question of substance regarding taxes and penalties under the United States Internal Revenue Code which has never heretofore been determined by your Honorable Supreme Court, and moreover, both said State Courts have decided the said substantial Federal question in such a way as to be wholly incompatible with the apposite reasoning that your Honorable Supreme Court inevitably and unquestionably would apply thereto.

6. The uniqueness of said substantial Federal question is proved beyond rebuttal by the words of Judge Scott, for a unanimous United States Tax Court (*Leyman Estate v. C. I. R.*, Docket #77075, filed 4-24-1963, 40 T. C. — No. 15; CCH Dec. 26,081, pp. 2369-91), at page 2389, where it is said:

> "Neither party has called our attention to a reported case involving a false or fraudulent estate tax return, *nor have we found any such reported case.*"

7. Hence petitioner respectfully suggests that it is well-nigh imperative that all United States judges, the bench and bar in all the States, and the many thousands of tax-paying fiduciaries, who might otherwise be victimized by the utter lack of such a beacon, are entitled to the ultimate guidance inevitably ensuing from a definitive, reasoned opinion of this Honorable Supreme Court to be reported on this grave Federal question, properly raised but improperly decided in the Courts below.

8. The grave error of the learned State Courts below upon the said substantial Federal question, here involved, is conclusively shown by the diametric opposition of their rulings to the decision of the United States Tax Court, on April 24, 1963, in *Leyman Estate v. C. I. R., supra* (par. #6), wherein, on page 2390 thereof, the latter Court said

> "We believe that a 'sensible construction, such as will effectuate the legislative intention' of the provisions

of Section 871(i), 894(a), and 3612(d) of the Internal Revenue Code of 1939 is that the 50 per centum addition is *to the difference between the correct tax liability and the tax shown on the return, or deficiency, and so hold.*" (Emphasis ours.)

(a) This is precisely the position and the ruling that petitioner previously urged in his original petition and briefs filed with your Honorable Supreme Court in this case now at bar, and it is likewise contrary not only to the views of the respondents, and of the United States, through its Attorney General and its Solicitor General, but also to the erroneous decisions of the learned Courts below. Such an irreconcilable variance between the State Courts and the only United States Court to have thus far passed upon such a substantial Federal question is but another more cogent reason for the allowance of Writ of Certiorari in this case.

9. It is a matter of record, and both sides (including the United States) admit that in the tax proceeding of *Hurst Estate v. C. I. R.*, it was stipulated by the parties and the *Tax Court found as a fact* that there was "*no deficiency of estate tax due*" to said Commissioner. Consequently under the United States Tax Court's ruling in the *Leyman Estate* case, *supra*, there could never be, or have been, any "estate tax penalty" for alleged "fraud" either legally due or lawfully collectible from this Winfred Hurst Estate in any amount at any time. Thus, the stipulation agreeing to imposition of said penalty of $28,180.78, and the subsequent proration judgment against petitioner in that amount, based thereon, in said Pennsylvania State Courts were both invalid and void *ab initio*. Such nullity, therefore, vitiates the judgments below as *functus officio*, especially when founded on an action in which this *petitioner had no notice and no opportunity to be heard*, and renders them "*a taking of petitioner's property without due process of law,*" in crass violation of both the 5th and

the 14th Amendments, U. S. Constitution—an added compelling reason for your Honorable Court's issuance of a Writ of Certiorari herein.

Wherefore, petitioner prays for a re-hearing of his said Petition for Allowance of Writ of Certiorari, as originally sought herein, and respectfully requests the allowance thereof forthwith.

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.

It is hereby certified that the preceding Petition for Re-hearing is presented in good faith and not for delay, and is restricted to the grounds above specified.

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.